JUL 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 252

CARPENTERS' LOCAL UNION NO. 1028, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES H. TUTTLE
15 Broad Street
New York 5, N. Y.

FRANCIS X. WARD
222 East Michigan Street
Indianapolis 4, Indiana

Of Counsel for Petitioner

BREED, ABBOTT & MORGAN
15 Broad Street
New York 5, N. Y.
Attorneys for Petitioner

307 BAR PRESS, INC., 54 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 5-3432

INDEX

	PAGE
Reference to Opinions Below	2
Jurisdictional Statement	2
Question Presented	2
Statutes Involved	3
Statement of the Case	4
A. The Facts	4
(1) The Agreement Between the Company and the Union	4
(2) The Refusal to Hire	4
(3) The Unfair Labor Practice Charges	6
B. The Proceedings Below	7
Argument	
The Decision of the court below conflicts with the decision of the Court of Appeals for the Third Circuit in the Penmwoven case, 194 F. 2d 521. Also it emasculates Section 10(b) of the National Labor Relations Act which requires that unfair labor practice charges be served and filed within six months of the unfair labor practice complained of. Also it presents a question of importance in the administration of the National Labor Relations Act	8
Conclusion	15

Table of Cases

PAGE

Bowen Products Corporation, 113 NLRB 371 12

National Labor Relations Board v. Childs Co., 195 F. (2d) 617 12

National Labor Relations Board v. Construction Specialties Co., 208 F. (2d) 170 8

National Labor Relations Board v. Pennwoven, Inc., 194 F. (2d) 521 ..... 8, 10, 11, 14

National Labor Relations Board v. United Hoisting Co., 198 F. (2d) 465 13

Table of Statutes

National Labor Relations Act
Section 10(b), 29 U. S. C. §160(b) 2, 3, 8, 10, 12, 13, 14
Section 8(b)(1)(A), 29 U. S. C. §158(b)(1)(A) 3, 7
Section 8(b)(2), 29 U. S. C. §158(b)(2) 3, 7
Section 10(e), 29 U. S. C. §160(e) 8

28 U. S. C. §1254 2

Index to Appendices

A—Intermediate Report of Trial Examiner 1a

B—Decision and Order of National Labor Relations Board 16a

C—Majority and Dissenting Opinions in the Court of Appeals 21a

D—Decree of Court of Appeals 29a

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

CARPENTERS' LOCAL UNION NO. 1028, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision and the decree of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 16, 1956.

REFERENCE TO OPINIONS BELOW

The Intermediate Report of the Trial Examiner, printed as Appendix A hereto (*infra*, p. 1a), is reported in part at 111 NLRB 1028.

The Decision and Order of the National Labor Relations Board, printed as Appendix B hereto (*infra*, p. 16a), is reported at 111 NLRB 1025.

The majority and dissenting opinions in the Court of Appeals, printed as Appendix C hereto (*infra*, p. 21a), are reported at 232 F. 2d 454.

The decree of the Court of Appeals is printed as Appendix D (*infra*, p. 29a).

JURISDICTIONAL STATEMENT

The decree of the Court of Appeals was entered on April 16, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where the alleged unfair labor practice was committed and established, and the right to relief accrued, more than six months before the filing and service of the charges, may subsequent, incidental adherences be availed of to circumvent the six-month limitation period prescribed by Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(b))?

STATUTES INVOLVED

The statutes involved are Sections 10(b), 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended.

The relevant provision of Section 10(b) states:

> "* * * No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

Section 8(b) provides in pertinent part as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title * * *
>
> "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

STATEMENT OF THE CASE

A. The Facts

(1) The Agreement Between the Company and the Union

The employer, Dennehy Construction Company, commenced construction of a hospital in Ardmore, Oklahoma, in June, 1953 (R. 11-12). At that time the Company entered into an oral agreement with Shelton M. Estes, business agent of Carpenters' Local Union No. 1028, the petitioner herein, to abide by the Union's by-laws and rules and hiring hall arrangements (R. 12, 58).

The Union's by-laws and rules, in pertinent part, provided that "No carpenter shall at any time work on premises where non-union carpenters are employed, unless they make application for membership * * *" (R. 12, 62). The Union's rules further specified that a foreman "in possession of a current working card of this Local Union" be employed "on any job where three or more carpenters are employed" (R. 13, 63), and that any foreman should be debarred from acting as such for six months if he should permit others than members of the Union to do carpenter work (R. 13).

(2) The Refusal to Hire

(a) On Thursday, September 17, 1953, N. W. Black applied at the job site for work on behalf of himself and his son, Tommie Black, to Chapman, the Company's carpenter foreman (R. 13, 33, 34-35, 40). The foreman knew Black's qualifications and told him that he needed and wanted both Black and his son (R. 13, 34, 39, 40). N. W.

Black testified that he was in fact "hired" on September 17, 1953 (R. 44); that "I had a job on the 17th" (R. 48), and again that:

> "* * * I have had a job there the first day since I talked to Mr. Chapman." (R. 47)

But Chapman also told N. W. Black that before he and his son could be employed, they would first have to clear through Local 1028 (R. 13, 34, 40), and he also warned Black that such clearance might be "tough" because the Union maintained a waiting list from which members were referred for employment (R. 13, 40).

(b) On Monday, September 21, 1953, N. W. Black went to the office of Local 1028 and spoke to Estes, the business agent of the Local (R. 13, 40, 55-56).

At this time the books of both N. W. and Tommie Black were "cleared" into Local 1028 through Estes, and N. W. Black was told by Estes that there was a waiting list for referrals for work and that he and his son would have to await their turn (R. 13, 40, 44, 55-56).

(c) On Friday, September 25, 1953, both Blacks went to Local 1028 and told Estes that they wanted work at the hospital project where jobs were awaiting them. Estes told them that there were thirty men ahead of them (R. 14, 41, 52).

The Blacks then proceeded to the job site and told Chapman, the foreman, what Estes had told them. He referred them to Gene Dennehy, the superintendent, who suggested that Chapman request the Union to call for the Blacks by name as foremen (R. 14, 36, 41, 52). This suggestion was made pursuant to the established system of

referrals of Local 1028 which permitted an employer to call for foremen by name, while carpenters generally could be called for only by the number needed (R. 14, 36, 49, 58).

(d) On Saturday, September 26, 1953, Chapman telephoned Estes and requested the two Blacks as foremen (R. 14, 36, 42, 53, 56-57).

(e) On Monday, September 28, 1953, the Blacks went to the office of Local 1028 to get their referral slips. Estes was on his way out. He did not give them referral slips, but rather, he told them that there would now be many more carpenters on the waiting list ahead of them, as he was going to shut down the job (R. 14, 42, 53).

Estes, meanwhile, had referred two other men to the job whom Chapman had refused to hire because he had not called for them. One of these two men thereupon communicated with Estes who proceeded to the job site and called the carpenters off the job. The strike lasted two or three days (R. 15, 38, 43, 51, 53, 57).

The Blacks also went to the job site and told Chapman what had occurred. Chapman told them he was sorry but he had done all that he could do (R. 15, 37-38).

(3) The Unfair Labor Practice Charges

The charges herein were filed on March 25, 1954, and were served on the petitioner on March 26, 1954 (R. 7).

B. The Proceedings Below

The general counsel, by his complaint, charged the petitioner with violation of Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended, 29 U. S. C. §§158(b)(1)(A) and 158(b)(2), first, by entering into an illegal closed shop agreement and secondly, by causing the Company to discriminate against the Blacks by refusing to hire them because they had not been referred by the Union (R. 6-8, 9-10).

The Trial Examiner's report, dated June 22, 1954, sustained the complaint and recommended that the petitioner cease and desist from entering into or enforcing the alleged preferential hiring agreement with the Dennehy Construction Company and from causing or attempting to cause the Company to discriminate against employees or prospective employees. Affirmatively, the Examiner further recommended, among other things, that the petitioner should post the usual notices and should "make whole N. W. Black and Tommie Black for any loss of pay they may have suffered as a result of the discrimination against them * * *" (*Infra*, p. 13a).

By its decision and order dated March 21, 1955, the National Labor Relations Board affirmed the Trial Examiner's findings and conclusions, with certain modifications (*Infra*, p. 16a). Among such modifications was the following:

> "Without determining whether a discriminatory refusal to hire occurred on September 17, 1953, a date beyond the 10(b) period, it is clear that the Blacks requested and were refused referral slips from Estes, the respondent's Business Agent, on September 28, 1953, a date within the Section 10(b) period." (*Infra*, p. 16a, footnote 1)

Thereafter, the National Labor Relations Board brought its petition for enforcement of the order, pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U. S. C. §160(e)), in the Court of Appeals for the Tenth Circuit. That Court (Judge Huxman dissenting in a forceful opinion) granted the petition for an enforcement. (*Infra*, p. 21a)

ARGUMENT

The Decision of the Court below conflicts with the decision of the Court of Appeals for the Third Circuit in the *Pennwoven* case, 194 F. 2d 521.

Also it emasculates Section 10(b) of the National Labor Relations Act which requires that unfair labor practice charges be served and filed within six months of the unfair labor practice complained of.

Also it presents a question of importance in the administration of the National Labor Relations Act.

A

The alleged unfair labor practice upon which this proceeding is predicated was committed on September 17, 1953 when N. W. Black applied for work on behalf of himself and his son and was refused employment. Instead, they were required first to obtain a referral from the Union although the employer had jobs ready and waiting for them. At this point, the discrimination against them was complete. Their right to bring unfair labor practice charges against either the Company or the Union or both had then accrued; and the Blacks could have filed such charges at any time within six months thereafter. *National Labor Relations Board* v. *Construction Specialties Co.*, 10 Cir., 208 F. 2d 170.

In its decision (*Infra*, p. 16a, fn. 1) the National Labor Relations Board sought to circumvent this difficulty by simply failing to find the obvious, to wit: that such a discriminatory refusal to hire occurred and was established on September 17, 1953.

And the majority of the Court of Appeals in its decision conceded that "the closed shop agreement * * * may be said to have been discriminatorily enforced on September 17th when the Blacks first applied for a job * * *." (*Infra*, p. 25a).

Nevertheless, the Board and the majority in the Court below concluded that the petitioner was guilty of a separate and distinct act of discrimination on September 28, 1953 (within the statutory period) *by adhering to its prior refusals* to refer the Blacks to the *same* jobs for which they had applied and been rejected for want of a referral from the petitioner more than ten days previously (beyond the statutory period).

B

We respectfully submit that both the Board and the majority in the Court below fell into error by failing to recognize the issue presented by this case.

It is important at the outset, therefore, to point out, as did Judge Huxman in his dissenting opinion in the Court below (*Infra*, p. 26a), that there were two unfair labor practices as found by the Board:

> (1) An unlawful closed shop agreement between the Company and the petitioner.
>
> (2) the consequent specific discrimination against the Blacks which constitutes the specific claim here.

The petitioner does *not* contend that the first charge, based upon the agreement, was barred by Section 10(b) of the Act.

But the petitioner *does* contend most earnestly that the second specific charge, which constitutes the specific claim here and is predicated upon the discriminatory refusal to hire the Blacks, was and is barred by Section 10(b) because that charge was not filed and served within six months after September 17, 1953, when the Blacks were discriminatorily denied available employment.

C

Such was the holding of the Court of Appeals for the Third Circuit in *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F. (2d) 521. There an employer was charged with discrimination in failing to recall employees who, by seniority, were entitled to vacant jobs as they occurred, because the employees had engaged in union activities. The charges were filed more than six months after the failure to rehire.

In disposing of the Board's contention that such a failure to rehire was comparable to a continuing tort, the Court stated the purpose of Section 10(b) as follows (194 F. (2d) at 524):

> "* * * the Congress inserted this limitation provision because there had been complaint that people were being brought to book upon stale charges. The rather brief limitation period was an effort to shorten up the time in which respondents could be called to answer charges of unfair labor practice. * * *"

The Court went on to point out the consequences of the continuing tort theory in these words (194 F. (2d) at 525):

"If we take the position that a discriminatory failure to reinstate an employee is to be treated like a continuing tort, that employee's case will never be closed until it is finally litigated. Ten years after the event, he can still file charges that he was discriminatorily discharged and that he should be reinstated with back pay."

Finally, the Court held (194 F. (2d) at 525):

"We do not think that such an interpretation of the statute accomplishes the legislative purposes. *We conclude that when the respondent in this case failed to call these three people back to work and they knew it and knew, or thought they knew, why they were not being called back, the respondent's act of discrimination had taken place and his liability accrued thereupon.* We do not think it continues indefinitely but is barred if charges are not brought within six months." (Emphasis added.)

Similarly here, when the Company failed to hire the Blacks because of its agreement with petitioner, and the Blacks "knew * * * why they were not being [employed], the [petitioner's] act of discrimination had taken place and [its] liability accrued thereupon."

D

In the *Pennwoven* case, furthermore, the employees had subsequently written letters to the employer within the six-month period, requesting employment. The Board contended that the employer's failure to hire them thereafter constituted an independent unfair labor practice. The Court, however, held that these letters were merely a repetition of previous demands for reinstatement and, as such,

"quite clearly made too late to comply with the six months limitation provision" 194 F. (2d) at 525. In accord with the decision in the *Pennwoven* case is *National Labor Relations Board* v. *Childs Co.*, 2 Cir., 195 F. (2d) 617.

So here, the subsequent attempts by the Blacks to circumvent the alleged illegal agreement by inducing the Company to call for them as foremen and the consequent strike by the Union to enforce that agreement were "but continuing steps in the denial of their right of employment because of the unlawful agreement", as Judge Huxman well said in his dissenting opinion in the Court below.

To hold otherwise, as did the Board here and the majority in the Court below,

> "* * * defeats the purpose of the limitation, because it results in making a new 'unfair labor practice' out of each repeated refusal of the employer to relent and retract. The necessary consequence is that the initial wrong can be made to persist indefinitely, unless the employer recants and the same must be also true as to the union." *National Labor Relations Board* v. *Childs Co.*, 195 F. (2d) 617 at 621 (concurring opinion of Judge Learned Hand).

For these reasons, in this *Childs* case Judge Hand concluded, as we do here, that the unlawful discrimination must be deemed "indivisible" and that the statutory six month period begins to run at the time when the injured party's right to institute unfair labor practice charges first accrues.

Indeed, in *Bowen Products Corporation*, 113 NLRB 371—a case decided by the National Labor Relations Board after its decision in this case, the Board itself held that it "would in effect render Section 10(b) meaningless" if

the running of the statutory period could be tolled, once an unfair labor practice has been committed, by repeated applications to the offending party for redress. 113 NLRB at 732.

E

Here, we respectfully submit, the unlawful discrimination against the Blacks was complete on September 17, 1953, when they were denied available employment by the Company solely by reason of its agreement with the petitioner. Yet, as the majority in the Court below conceded, "If the unfair labor practice occurred prior to September 26, 1953, it is barred." (*Infra*, p. 24a)

In our view the Board and the majority in the Court below fell into error when they created a brand new unfair labor practice out of the reiteration by Estes, on September 28, 1953, of his prior refusals to refer the Blacks immediately to the jobs for which they had applied and the employer had wanted them ten days previously.

In sum, we contend that the holdings below do violence alike to the plain language of Section 10(b) and to the settled rule that the statute of limitations begins to run from the time when the injured party's right of action accrues.

F

The majority in the Court below relied on *National Labor Relations Board* v. *United Hoisting Co.*, 3 Cir., 198 F. (2d) 465. But that case is the converse of this and, we submit, serves only to illumine the fatal flaw in the prevailing opinion below.

There the bar of Section 10(b) was invoked as a defense to the general charge of entering into an unlawful closed shop agreement and *not* to the *timely* specific charge of a wrongful discharge pursuant to the illegal agreement. The Court there held that the observance of the illegal agreement was a continuing offense not subject, so long as the agreement remained in force, to the bar of Section 10(b).

Here, however, the petitioner relies on Section 10(b) as a defense to the *untimely* specific charge of discrimination constituting the specific claim and *not* to the general charge of an unlawful agreement.

The majority in the Court below, we submit, plainly confused these two charges, and such confusion is evident in the citation and discussion of the *United Hoisting* case in the prevailing opinion.

The decision below thus not only fails to give effect to the plain language of Section 10(b) but it also threatens to jeopardize its proper application in future cases—particularly in view of the conflict it poses with the decision of the Court of Appeals for the Third Circuit in the *Pennwoven* case.

We respectfully submit, therefore, that this Court which, so far as we can determine, has yet to consider the applicable provisions of Section 10(b), should review the decision below in order to rescue the statute from the threat of emasculation which, in our view, that decision poses, and in order to resolve the conflict it presents with the decision in the *Pennwoven* case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

CHARLES H. TUTTLE
FRANCIS X. WARD
Of Counsel for Petitioner

BREED, ABBOTT & MORGAN
15 Broad Street
New York 5, N. Y.
Attorneys for Petitioner

APPENDIX A

Intermediate Report of Trial Examiner

INTERMEDIATE REPORT

STATEMENT OF THE CASE

A charge having been duly filed and served, a complaint and amendment to complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by the above-named Respondent Union, a hearing involving allegations of unfair labor practices in violation of Section 8 (b) (1) (A) and (2) of the National Labor Relations Act, as amended, (61 Stat. 136), herein called the Act, was held in Ardmore, Oklahoma on May 25 and 26, 1954, before the undersigned Trial Examiner.

As to the unfair labor practices, the complaint as amended alleges, and the answer denies, that the Respondent Union, on September 28, 1953, caused The Dennehy Construction Company to refuse to hire N. W. Black and Tommie Black, entered into and maintained a verbal agreement with the same employer requiring referral by the Union of all employee applicants, and by such conduct restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act.

At the hearing all parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record and to file briefs and

proposed findings of fact and conclusions of law. Argument was waived at the close of the hearing. Following the hearing General Counsel and counsel for the Union informed the Trial Examiner that each waived the privilege of filing a brief.

Upon the entire record in the case, and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The business of the employer involved

The Dennehy Construction Company is a partnership having its principal office in Oklahoma City, Oklahoma, and at all times material has been engaged, under contract with the Southern Memorial Hospital Foundation of Ardmore, Oklahoma, in the construction of a hospital at Ardmore, as the general contractor. Such construction began about June 1, 1953, and was continuing at the time of the hearing.

During the 12-month period before the hearing Dennehy purchased building materials and equipment valued at more than $1,000,000, more than 50 percent of which was shipped in interstate commerce to the Ardmore Hospital site and other construction sites in Oklahoma from points outside that State. Its contract with the Southern Memorial Hospital Foundation for the construction of the hospital approximates $1,250,000, about half of this amount being paid from Federal funds.

It is found that the Dennehy Construction Company is engaged in commerce within the meaning of the Act.

Appendix A

II. The labor organization involved

Carpenters Local Union 1028, United Brotherhood of Carpenters & Joiners of America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

A. Events and issues

The major issue arises from the failure of Shelton M. Estes, business agent of Local 1028, in the setting of an exclusive hiring agreement, to send or "refer" to the Ardmore Hospital job 2 carpenters—N. W. and Tommie Black—when specifically requested to do so by the employer Dennehy. There is no dispute that the request was made, that Estes failed to honor the request, and that an exclusive hiring agreement was at the time in existence.

Briefly summarized the surrounding circumstances are as follows. Early in June, 1953, when construction was begun, Estes and Dennehy entered into an oral agreement which the business agent, as a witness for the Respondent Union, thus described:

I was assured by Mr. Gene Dennehy that this was a union company and that they would hire union carpenters and that they would abide by our by-laws and regulations and that the hiring hall arrangement was perfectly all right with them because that is exactly what they wanted. Estes further said that it was "a gentleman's agreement" that the employer would follow the rules and by-laws of Local 1028. The rules and by-laws are in evidence. Among relevant portions of such documents are:

Appendix A

Rule I

Section 16. No carpenter shall at any time work on premises where non-union carpenters are employed, unless they make application for membership, or work for any contractor who employes (sic) non-union carpenters on any work in this jurisdiction.

Rule II

Section 1. On any job where three or more carpenters are employed there shall be a foreman who is in possession of a current working card of this Local Union.

Section 1, Article IX of the By-Laws

A foreman who . . . permits others than members of the United Brotherhood to do carpenter work shall be debarred from acting as foreman for a period of six months . . .

Thus it is clear, and the Trial Examiner finds, that the complaint is sustained by the evidence to the effect that an oral agreement between the employer and the Respondent Union, setting up closed shop conditions as to hiring, was entered into.

Credible evidence also establishes that this agreement was thereafter observed and maintained in practice—at least until sometime in the early part of 1954—and was in effect on September 28, 1953, when the Blacks were denied referral to the job by the Union. D. J. Dennehy, one of the partners of the construction company, testified that carpenters were obtained from no other source than Local 1028 from June, 1953, until April 6, 1954. George Chapman, carpenter general foreman and a member of the Re-

spondent Union, testified that he hired carpenters only through Local 1028 and from no other source until—and his memory as to dates on this point plainly was but an estimate—February or March, 1954. Chapman said that he had been warned by Dennehy, apparently when he became general foreman on September 22, 1953, that he must observe the referral system of Local 1028. And, as noted above, the by-laws of his Local required that he hire only fellow-members.

On September 17, 1953, N. W. Black came to the hospital job site and applied to Chapman (who at the time was foreman) for work for himself and his son, as carpenters. Chapman, who had worked with N. W. Black before and knew his qualifications, said he needed and wanted them, but that they would have to clear through Local 1028. He also warned Black that such clearance might be tough because the local followed a "waiting list" in making referrals.

Both Blacks were at the time members of another local of the United Brotherhood of Carpenters. On September 21 they "cleared" their union books into Local 1028, through Estes. On this occasion the business agent told Black that a waiting list was followed in making referrals and Black, without then stating that he and his son had jobs awaiting them at the hospital site, apparently voiced no objection to this arrangement.

On Friday of the same week, September 25, both Blacks visited Estes, said they wanted work at the hospital project, where jobs were awaiting them, and asked how many were ahead of them on the list. Estes told them about 30.[1]

[1] Estes said that he did not recall this visit of the Blacks, upon whose credible testimony the finding is made.

The Blacks then proceeded to the job site, where they told Chapman what Estes had said about 30 applicants being ahead of them. Chapman referred them to Gene Dennehy, the superintendent, who suggested that Chapman try calling for the Blacks as foremen. Chapman then told the Blacks to come back the next morning, since he was busy at the time.

On Saturday morning, September 26, Chapman telephoned to Estes, told him he had 2 men there, naming them, whom he would like to have sent out to the job "as foremen." Estes agreed to the request. Chapman thereupon took the Blacks to the job he wanted them to perform when, as expected, they were referred to the site the following Monday morning.[2]

In explanation of the decision to call for the Blacks as foremen, it appears from the testimony of both the foreman and Estes that the established system of referrals by Local 1028 permitted an employer to call for foremen by name, while carpenters generally could be called for only by the number needed. In effect, this arrangement meant that an employer was permitted individual selection only as to supervisors.

Early Monday morning the 2 Blacks went to the Local office to obtain their referral slips. Estes was on his way out and not only brushed aside their request for the refer-

[2] The finding as to the conversation between Chapman and Estes on this occasion is based upon the credible testimony of the foreman and the inherent probabilities of the circumstances surrounding the event. Estes' testimony to the effect that Chapman first asked him for 2 carpenters, and then asked for the 2 Blacks as foremen, is not credited. His other testimony makes it clear that he was well aware, at the time, that the younger Black held only an apprentice card, and obviously was not qualified as a foreman.

rals but bluntly told them that as soon as he could get to the job site there would be many more carpenters on the waiting list ahead of them. The Blacks proceeded nevertheless to the hospital site, where they reported to Chapman and told him of Estes action.

In the meantime 2 other men, referred that same morning to the job by Estes, had reported at the site. Chapman refused to employ them, telling them that he had not called for them. One of them communicated with Estes, who promptly hurried to the job site and, according to his own testimony, called the carpenters off the job. They were not permitted to return for 2 or 3 days. Estes's own testimony makes it clear that the prime reason for this precipitate action was the failure of the employer to hire the 2 men whom he had sent out to the job instead of the Blacks.

Upon learning of Estes' action, Chapman told the Blacks that "I am very sorry but I have done all I can do." They were not hired, nor have they since then been employed on the job,—although it appears that since April, 1954, according to Dennehy, the employer has not hired through Local 1028 exclusively.

B. Conclusions

General Counsel contends that the exclusive hiring agreement, described above, constitutes on the part of the Union a violation of Section 8 (b) (1) (A) and (2) of the Act. The contention has merit. In particular is the agreement invalid in that, by incorporating the Local's trade rules and by-laws, it caused the employer to violate Section 8 (a) (3) of the Act by setting up a discriminatory hiring policy, limiting such hiring to Union members referred to it by Local 1028. Such discrimination effectively restrains

and coerces employees and prospective employees in the exercise of rights guaranteed by the Act.[3]

General Counsel further contends that, by causing Dennehy to refuse to hire the 2 Blacks because (among other reasons alleged in the complaint[4]) they were not "cleared by the said Respondent Union," the Union also violated Section 8 (b) (1) (A) and (2) of the Act. This contention also has merit. The employer was caused, by the action of Estes in calling the strike of the carpenters on September 28, to refuse to hire the Blacks. The admitted reason for the strike—the refusal of the employer to place the 2 men sent out in place of the Blacks, is a component part of the guiding motive which caused action resulting in discrimination against the Blacks, in a situation then governed by an illegal hiring agreement.[5]

Although, as noted above, it appears that since April, 1954, the employer has not hired exclusively through Local 1028, and that to this extent the oral agreement of June, 1953, is not now being observed in practice, there is no evidence that it has formally been abandoned. A remedy believed to be suitable will therefore be recommended.

Also, although from the present record it might be speculated that had the Blacks applied for jobs after April 6, 1954, they might have been hired, in view of the Union's overt action directed against their employment in Sep-

---

[3] *Philadelphia Iron Works, Inc.*, 103 NLRB at 596, enf'd 211 F. 2d 937 (C.A. 3).

[4] The complaint alleges a number of reasons for the causation which seem to the Trial Examiner to be irrelevant and even inapplicable under circumstances of hiring. In the latter category is the allegation that a reason for the causation was "other than failure to tender periodic dues."

[5] *Local 595, et al. (Bechtel Corporation)*, 108 NLRB No. 149.

tember, 1953, and the absence of any evidence that such action has since then been remedied or disavowed, the Trial Examiner must hold the Respondent Union accountable for the continuing failure of the employer to hire them, until such time as the Union informs the employer, in writing, that it has no objection to their hiring.

As to the claim, made during the hearing by counsel for the Respondent Union, that the complaint should be dismissed because the evidence establishes that the employer sought the employment of the Blacks as foremen, unprotected by the Act, the Trial Examiner is unable to agree that the evidence establishes the fact. Whatever the words used by Chapman in calling for the Blacks "as foremen," the Trial Examiner cannot believe that Estes misunderstood the obvious nature of the call—a ruse whereby Chapman, a foreman member of Local 1028, believed he could circumvent the carpenters' waiting list. His own testimony makes it plain that Estes well knew the younger Black was only an apprentice carpenter.[6]

IV. The effect of the unfair labor practice upon commerce

The activities of the Respondent, set forth in Section III above, occurring in connection with the operations of the employer involved, described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

---

[6] Estes said that on September 21 the elder Black brought to him, for clearance into Local 1028, "a book for N. W. Black, journeyman, and a book for Tommie Black, apprentice."

Appendix A

V. The remedy

Having found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that the Respondent make N. W. and Tommie Black whole for any loss of pay suffered by them as the result of the Union's unlawful conduct, by paying to them a sum of money equal to that which they would normally have earned as wages from September 28, 1953, to the date they are hired by the employer, The Dennehy Construction Company. In computing the amount of back pay due to the Blacks, the customary formula set forth in F. W. Woolworth Company, 90 NLRB 289, shall be applied. It will further be recommended that the Respondent may terminate its liability for further accrual of back pay to one or both of the charging individuals by notifying the employer herein involved that it has no objections to their reinstatement. The Respondent shall not be liable for any back pay accruing after 5 days from the giving of such written notice.

The unlawful conduct of the Respondent found herein indicates a purpose to limit the lawful rights of employees and applicants for employment. Such purpose is related to other unfair labor practices, and it is found that the danger of their commission is reasonably to be apprehended. It will therefore be recommended that the Respondent cease and desist from in any manner restraining and coercing employees and applicants for employment in the exercise of rights guaranteed by the Act.

Appendix A

Upon the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. The Dennehy Construction Company is engaged in commerce within the meaning of Section 2 (6) of the Act.

2. Carpenters Local Union No. 1028, United Brotherhood of Carpenters & Joiners of America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By causing the aforementioned employer to discriminate against applicants for employment in violation of Section 8 (a) (3) of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

4. By restraining and coercing employees and prospective employees of the employer herein involved in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the Trial Examiner recommends that

the Respondent Local 1028, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Entering into or enforcing a preferential hiring agreement or arrangement with The Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the Act.

(b) Causing or attempting to cause The Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the Act.

(c) In any other manner restraining or coercing employees or prospective employees of the above-named employer in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Trial Examiner finds will effectuate the policies of the Act:

(a) Notify The Dennehy Construction Company in writing, and furnish copies thereof to N. W. Black and Tommie Black, that they or any other qualified employee or prospective employee will not be denied employment because of membership or non-membership in the Respondent except to the extent authorized by Section 8 (a) (3) of the Act. Said notification shall contain a statement to the effect that the Respondent has no objection to the employ-

ment of N. W. Black and Tommie Black by The Dennehy Construction Company.

(b) Make whole N. W. Black and Tommie Black for any loss of pay they may have suffered as a result of the discrimination against them, in the manner set forth in the Section entitled "The remedy."

(c) Post in conspicuous places at the business offices of the Respondent, and in all places where notices or communications to its members are customarily posted, copies of the notice attached hereto and marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for the Sixteenth Region signed copies of the notice, attached hereto as Appendix, for posting, the employer willing, on the bulletin boards of The Dennehy Construction Company at its Ardmore Hospital project, where notices to employees are customarily posted. Such notices are to be posted and maintained for a period of sixty (60) days after receipt by the employer. Copies of the notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by an official representative of the Respondent, be forthwith returned to the Regional Director for said posting;

Appendix A

(e) Notify the Regional Director for the Sixteenth Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, as to what steps the Respondent has taken to comply herewith.

It is further recommended that unless the Respondent shall within twenty (20) days from the date of the receipt of this Intermediate Report notify the said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring it to take the action aforesaid.

Dated at Washington, D. C., this 22 day of June, 1954.

C. W. Whittemore,
Trial Examiner.

APPENDIX

Notice

To all members of Carpenters Local Union No. 1028, United Brotherhood of Carpenters & Joiners of America, AFL, pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and employees of The Dennehy Construction Company that:

We will not enter into or enforce a preferential hiring agreement or arrangement with The Dennehy Construction Company, its officers, agents, successors, or assigns, except to the extent permitted by Section 8 (a) (3) of the Act.

Appendix A

We will not cause or attempt to cause The Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against N. W. Black and Tommie Black, or any other employee or prospective employee in violation of Section 8 (a) (3) of the Act.

We will not in any other manner restrain or coerce employees or prospective employees of The Dennehy Construction Company in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We will make N. W. Black and Tommie Black whole for any loss of pay suffered by them as a result of our having prevented their employment by The Dennehy Construction Company.

We will notify The Dennehy Construction Company that we have no objection to the hiring of N. W. Black and Tommie Black.

Carpenters Local Union No. 1028,
United Brotherhood of Carpenters
& Joiners of America, AFL

Dated By
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material.

APPENDIX B

Decision and Order of National Labor Relations Board

DECISION AND ORDER

On June 22, 1954, Trial Examiner C. W. Whittemore issued his Intermediate Report in this proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (b) (1) (A) and 8 (b) (2) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications[1] and additions:

The Dennehy Construction Company is a partnership having its principal office in Oklahoma City, Oklahoma, and at all times material has been engaged, as general contractor under contract with the Southern Memorial Hospital Foundation of Ardmore, Oklahoma, in the con-

[1] Without determining whether a discriminatory refusal to hire occurred on September 17, 1953, a date beyond the Section 10(b) period, it is clear that the Blacks requested, and were refused, referral slips from Estes, the Respondent's Business Agent, on September 28, 1953, a date within the Section 10(b) period.

struction of a hospital at Ardmore. Its contract for the construction of the hospital approximates $1,250,000, about one half of this amount being paid from Federal funds.

The Dennehy Construction Company, as general contractor for the Ardmore Hospital, has sub-contracted the electrical, plumbing, heating, plastering, flooring, roofing, sheet metal, tiling, and acoustical work on the job. It appears that the sub-contractors purchase their own equipment and supplies for which they are reimbursed by the general contractor. During the past year, structural steel, face brick, electrical equipment, plumbing supplies, air conditioning equipment, concrete mixers, motors, and lumber valued in excess of $1,000,000 was shipped to the Dennehy construction sites including the Ardmore Hospital within the State of Oklahoma. Over 50 percent of these materials and supplies were shipped in interstate commerce from points outside the State. The record shows that of the materials and equipment received from points outside the State, a considerable amount of such materials and equipment was purchased by the sub-contractors for the Ardmore Hospital job. It appears from the record that although the Dennehy Construction Company itself did not purchase material and equipment valued in excess of $500,000 from outside the State, the purchases of Dennehy Construction Company together with its sub-contractors directly from outside the State for use on the Ardmore hospital site exceeded that amount. It appears further that Dennehy Construction Company, the general contractor, was solely responsible for the performance and completion of the job.

In the future, the Board will assert jurisdiction over a general construction contractor on the basis of the total volume of his business or of the general construction which he undertakes to discharge.

Appendix B

In view of the foregoing, and as it appears that the Dennehy Construction Company and its sub-contractors, together, purchased materials and equipment valued in excess of $500,000 from outside the State of Oklahoma for use on the Ardmore hospital job, we shall assert jurisdiction.[2]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Carpenters Local Union No. 1028, United Brotherhood of Carpenters and Joiners of America, AFL, its officers, agents, successors, or assigns, shall:

1. Cease and desist from:

(a) Entering into or enforcing a preferential hiring agreement or arrangement with the Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the Act.

(b) Causing or attempting to cause the Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the Act.

(c) In any other manner restraining or coercing employees or prospective employees of the above-named employer in the exercise of the rights guaranted in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor

---

[2] *Jonesboro Grain Drying Cooperative*, 110 NLRB No. 67.

organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Notify the Dennehy Construction Company, in writing, and furnish copies thereof to N. W. Black and Tommie Black, that they or any other qualified employee or prospective employee will not be denied employment because of membership or non-membership in the Respondent except to the extent authorized by Section 8 (a) (3) of the Act. Said notification shall contain a statement to the effect that the Respondent has no objection to the employment of N. W. Black and Tommie Black by the Dennehy Construction Company.

(b) Make whole N. W. Black and Tommie Black for any loss of pay they may have suffered as a result of the discrimination against them, in the manner set forth in the Section entitled "The remedy."[3]

(c) Post in conspicuous places at the business offices of the Respondent, and in all places where notices or communications to its members are customarily posted, copies of the notice attached to the Intermediate Report as Ap-

[3] The remedy is amended to provide that the Respondent, in order to terminate its liability for further accrual of back pay to one or both of the charging individuals, must notify N. W. Black and Tommie Black, as well as the Employer, that it has no objection to their employment. Local Union No. 595, International Association of Bridge, Structural and Ornamental Iron Workers, AFL, 100 NLRB No. 12.

pendix A.[4] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for the Sixteenth Region signed copies of the notice for posting, the employer willing, on the bulletin boards of the Dennehy Construction Company at its Ardmore Hospital project, where notices to employees are customarily posted. Such notices are to be posted and maintained for a period of sixty (60) days after receipt by the Employer. Copies of the notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by an official representative of the Respondent, be forthwith returned to the Regional Director for said posting.

(e) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order, as to what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., March 21, 1955.

Guy Farmer, Chairman.
Ivar H. Peterson, Member.
Philip Ray Rodgers, Member.
National Labor Relations Board

(SEAL)

---

[4] This notice shall be amended by substituting for the words, "the recommendations of a Trial Examiner," the words "a decision and order." If this Order is enforced by a decree of the United States Court of Appeals, the notice shall be further amended by substituting for the words "pursuant to a decision and order" in the caption, the words "pursuant to a decree of the United States Court of Appeals, enforcing an order."

APPENDIX C

Majority and Dissenting Opinions in the Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NOVEMBER TERM—1955

Number 5465

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CARPENTERS' LOCAL UNION NO. 1028, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

Martin Sacks (Theophil C. Kammholz, David P. Findling, Marcel Mallet-Prevost, Samuel L. Singer and William J. Avrutis were with him on the brief) for Petitioner.

Wayne D. Williams (Francis X. Ward and William A. McGowan were with him on the brief) for Respondent.

Before HUXMAN, MURRAH and PICKETT, Circuit Judges.

Appendix C

MURRAH, Circuit Judge.

This is a petition to enforce an order of the National Labor Relations Board, and the only question is whether the unfair labor practices found are barred by Section 10(b) of the Act (29 USC 160(b)), which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. * * *"

The Board found that the respondent Union had violated Section 8(b)(2) and (1)(A) of the Act by entering into an alleged illegal closed shop agreement with an employer, thereby causing the employer to adopt a discriminatory hiring policy; and Section 8(b)(2) and 1(A) by causing the employer to discriminatorily refuse to hire N. W. and Tommy Black, two prospective employees, because they had not been cleared for the job by the Union.

These findings are based upon unchallenged subsidiary findings of the Board to the effect that in June 1953, employer, Dennehy, entered into an agreement with the Union for the hiring of workmen on a construction project at Ardmore, Oklahoma, under the terms of which only Union workmen would be employed on the job by referral from the respondent Union. On September 17, 1953, N. W. Black came to the job site and applied to Foreman Chapman for work for himself and his son, Tommy, as carpenters. Knowing of Black's qualifications, Chapman told him that he wanted him on the job but he would have to clear through the respondent Union. On September 21, both Blacks cleared their books through the Union, and on the 25th they explained to the Union Business Agent that jobs awaited them if they could get cleared. They were told

by the Agent that there was a waiting list of about thirty employees. The Blacks then went to the job site and told Chapman of their conversation with the Business Agent. They were referred to the Superintendent of the project who stated that he could, under the rule, call for them by name as foremen. On the next morning, Saturday the 26th, Chapman called the Agent at his home, asking that the Blacks be sent out on the job as foremen. The Board found that the Agent agreed to the request. The Blacks were shown around the project and told what they would be expected to do upon reporting for duty Monday morning.

When, on Monday morning, the 28th, the Blacks went to the Local Union office for their referral slips, they met the Union Agent coming out of the door, who told them that as soon as he could get out to the job there would be many more carpenters on the waiting list as he was going to shut down the job. When the Blacks told Chapman of the result of their conversation with the Agent, Chapman said that he was sorry but that he had done all he could. While this conversation was taking place, the Union Agent came to the job and called all of the workmen off the job, apparently because Chapman had refused to hire two men whom the Agent had sent out to the job instead of the Blacks.

The Board's order required the Union to cease and desist from imposing a closed shop agreement on the employer and to affirmatively notify the two Blacks in writing that they would not be denied employment because of membership or nonmembership in the Union, except as authorized by Section 8(a)(3) of the Act; and that the Union had no objection to the employment of the Blacks. The Union was also required to make the Blacks whole and post the customary notices.

Appendix C

The Union does not challenge the findings of the Board with respect to the unfair labor practices, but contends that it occurred on September 17, 1953, when the Blacks applied for employment and were told by the employer that he could not hire them without clearance or referral from the Union. The imposition of the closed shop is said to constitute the unfair labor practice complained of; that it was complete and clear cut at that time, and a complaint filed more than six months thereafter is barred by the statute. The complaint was filed on March 25, 1954, and served on the respondent March 26, 1954, and if the unfair labor practice occurred prior to Saturday, September 26, 1953, it is barred.

The Union relies upon N. L. R. B. v. Pennwoven, 194 F. 2d 521, where the unfair labor practice consisted of refusal of the employer to reinstate three employees because of their union affiliations. In these circumstances, the Third Circuit held that the unfair labor practice was complete upon the refusal to reinstate, and the failure to rehire was not a continuing unfair labor practice. In another subsequent case (N. L. R. B. v. United Hoisting Co., 198 F. 2d 465), the Third Circuit had a situation under a closed shop agreement. As against the contention that the unfair labor practice dated back to the closed shop agreement more than six months from the date of the complaint, the court observed that the Board's finding of unfair labor practice was founded upon the discharge of the employee in the course of the enforcement of the illegal closed shop agreement, and that the discharge being within the six months period prescribed by Section 10(b), it was not barred. The court drew a distinction between that case and its Pennwoven case, and following Katz v. N. L. R. B., 196 F. 2d 411, held that the continuous enforcement of the illegal hiring agreement within six months prior to the

filing of the complaint, constituted the unfair labor practice, and that such practice was therefore not barred. And see N. L. R. B. v. F. H. McGraw Co., 206 F. 2d 635; N. L. R. B. v. Gaynor News Co., Inc., 197 F. 2d 719.

Our facts are not decisively different. Here the closed shop agreement was entered into in June. And, while it may be said to have been discriminatorily enforced on September 17th when the Blacks first applied for a job and were told that they would have to clear through the Union, it was also enforced on the 28th when they were refused job clearance and the strike was called to enforce the illegal agreement. We therefore hold that the complaint is within the statutory period of limitations and the order of the Board will be enforced.

Appendix C

Dissenting Opinion

Number 5165

HUXMAN, Circuit Judge, dissenting.

I would refuse to enforce the order of the Board on the ground that the action was barred by Section 10(b) of the Act [29 U.S.C.A. §160(b)] because not brought within six months from the commission of the unlawful act. There were two violations of the Act as found by the Board. One was the unlawful agreement between the Dennehy Construction Company and the Union under which no one was to be employed who had not been cleared by the Union. Such agreement constituted a violation of the provisions of the Act, participated in by both the Dennehy Construction Company and the Union. That was a continuing violation dating from the date of the execution of the agreement. An action could have been brought by anyone aggrieved thereby at any time after the date of its execution and so long as that agreement remained in force. That was not, however, the violation complained of by the Blacks upon which this proceeding is predicated. They complain of the denial of their right to employment when they applied for employment because of such unlawful agreement.

When the Blacks applied for employment on September 17, the employer could have refused to employ them for any reason other than because of the unlawful agreement. There were jobs available for which they were qualified. They were needed and Chapman, Dennehy's foreman, wanted them; he promised them employment as soon as they could secure clearance from the Union. In other words, he refused to employ them at that time be

cause of the unlawful agreement. This he could not do and this conduct on his part constituted a violation of their rights under the Act. This violation occurred on September 17. The subsequent acts of September 21, 25, 26 and 28 were but continuing steps in the denial of their right to employment because of the unlawful agreement. Both the Dennehy Construction Company and the Union were guilty of violations of the Act on September 17. Dennehy could no more deny employment to the Blacks until the unlawful agreement was complied with than the Union could insist that employment be denied until the conditions of the contract had been complied with. Since more than six months elapsed after the Blacks were denied employment on September 17 and before they began this action, the action is barred.

The facts in this case are indistinguishable to me from those in NLRB v. Pennwoven, Inc., 194 F. 2d 521, in which the Third Circuit denied enforcement of an order because of the statutory limitation imposed by the Act. Neither do I find anything in the later case of NLRB v. United Hoisting Company, 198 F. 2d 456, by the Third Circuit, which requires a different holding. No unlawful agreement such as we have here was involved in the Pennwoven case. The only question there was whether the right of the workers to be recalled was violated more than six months prior to the institution of the action by the Board. That was the identical question involved in the United Hoisting Company case. The only difference between the two cases was that in the United Hoisting Company case the employees were unlawfully discharged as a result of an unlawful agreement between the employer and the Union, and the only question was whether such unlawful discharge pursuant to the agreement occurred within the statutory

time for the institution of an action. All the court held was that the running of the statute began from the date of the unlawful discharge under the agreement and not from the date of the execution thereof. This is the identical question we have here. The difference in the result of the two cases is occasioned by the fact that in the United Hoisting Company case the unlawful discharge of the employees involved caused by the unlawful agreement was only three days prior to the institution of the action, while in our case I construe the violation of the Blacks' rights resulting from the unlawful agreement to have occurred on the 17th day of September, more than six months before they took steps to institute this action.

APPENDIX D

Decree of Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 5165

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CARPENTERS' LOCAL UNION NO. 1028, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,

Respondent.

Decree Enforcing an Order of the National Labor Relations Board

Before: HUXMAN, MURRAH and PICKETT, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 21, 1955. The Court heard argument of respective counsel on January 3, 1956, and has considered the briefs and the transcript of record filed in this cause. On March 7, 1956, the Court, being fully advised in the premises, handed down its decision enforcing the order of the Board. In conformity therewith, it is hereby

Appendix D

ORDERED, ADJUDGED AND DECREED that Carpenters Local Union No. 1028, United Brotherhood of Carpenters and Joiners of America, AFL, its officers, agents, successors, or assigns, shall:

1. Cease and desist from:

(a) Entering into or enforcing a preferential hiring agreement or arrangement with The Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter called the Act).

(b) Causing or attempting to cause The Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the Act.

(c) In any other manner restraining or coercing employees or prospective employees of the above-named Employer in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Notify The Dennehy Construction Company, in writing, and furnish copies thereof to N. W. Black and Tommie Black, that they or any other qualified employee or prospective employee will not be denied employment because of membership or nonmembership in the Respond-

ent except to the extent authorized by Section 8 (a) (3) of the Act. Said notification shall contain a statement to the effect that the Respondent has no objection to the employment of N. W. Black and Tommie Black by The Dennehy Construction Company.

(b) Make whole N. W. Black and Tommie Black for any loss of pay they may have suffered as a result of the discrimination against them, in the manner set forth in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated June 22, 1954, entitled "The Remedy."

(c) Post in conspicuous places at the business offices of the Respondent, and in all places where notices or communications to its members are customarily posted, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region of the National Labor Relations Board, Fort Worth, Texas, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the aforesaid Regional Director signed copies of the notice for posting, the Employer willing, on the bulletin boards of The Dennehy Construction Company at its Ardmore Hospital project, where notices to employees are customarily posted. Such notices are to be posted and maintained for a period of sixty (60) days after receipt by the Employer. Copies of the notice, to

be furnished by the said Regional Director, shall, after being duly signed by an official representative of the Respondent, be forthwith returned to the Regional Director for said posting.

(e) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree, as to what steps the Respondent has taken to comply herewith.

WALTER A. HUXMAN
Judge, United States Court of Appeals
for the Tenth Circuit

Dated: April 16, 1956

Appendix D

Appendix A

NOTICE

To All Members of Carpenters Local Union No. 1028, United Brotherhood of Carpenters & Joiners of America, AFL

Pursuant To

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and employees of The Dennehy Construction Company that:

We Will Not enter into or enforce a preferential hiring agreement or arrangement with The Dennehy Construction Company, its officers, agents, successors, or assigns, except to the extent permitted by Section 8 (a) (3) of the Act.

We Will Not cause or attempt to cause The Dennehy Construction Company, its officers, agents, successors, or assigns, to discriminate against N. W. Black and Tommie Black, or any other employee or prospective employee in violation of Section 8 (a) (3) of the Act.

We Will Not in any other manner restrain or coerce employees or prospective employees of The Dennehy Construction Company in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
A. The Board's findings and conclusions	2
B. The decision of the court below	5
Argument	6
Conclusion	8

CITATIONS

Cases:	
Katz v. *National Labor Relations Board*, 196 F. 2d 411	6, 8
National Labor Relations Board v. *Childs Co.*, 195 F. 2d 617	7
National Labor Relations Board v. *Dallas General Drivers etc.*, 228 F. 2d 702	7
National Labor Relations Board v. *Gaynor News Co.*, 197 F. 2d 719, affirmed, 347 U. S. 17	7
National Labor Relations Board v. *International Brotherhood of Teamsters etc.*, 225 F. 2d 343	7
National Labor Relations Board v. *F. H. McGraw & Co.*, 206 F. 2d 635	7
National Labor Relations Board v. *Pennwoven, Inc.*, 194 F. 2d 521	7
National Labor Relations Board v. *Textile Machine Works, Inc.*, 214 F. 2d 929	7, 8
National Labor Relations Board v. *United Hoisting Co.*, 198 F. 2d 465, certiorari denied, 344 U. S. 914	7, 8
National Labor Relations Board v. *White Construction and Engineering Co., Inc.*, 204 F. 2d 950	7, 8
Superior Engraving Co. v. *National Labor Relations Board*, 183 F. 2d 783, certiorari denied, 340 U. S. 930	7

394369—56

Statutes:

	Page
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*)	2
Section 8 (b) (1) (A)	2, 5
Section 8 (b) (2)	2, 5
Section 10 (b)	3

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 252

CARPENTERS' LOCAL UNION NO. 1028, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. C) is reported at 232 F. 2d 454. The findings of fact, conclusions of law and order of the Board (Pet. App. A and B, R. 11–20, 24–27) are reported at 111 NLRB 1025.

JURISDICTION

The judgment of the court below (Pet. App. D, pp. 29a–32a) was entered on April 16, 1956. The petition for a writ of certiorari was filed on July 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Section 10 (b) of the National Labor Relations Act precludes the issuance of a complaint based upon unfair labor practices occurring more than six months prior to the filing of the charges. The question presented is whether the charge initiating the instant proceedings, which is based upon petitioner's discriminatory treatment of employees within six months of the charge, is barred by Section 10 (b) because petitioner had previously discriminated against them in similar fashion more than six months prior to the filing of the charge.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Petition, p. 3.

STATEMENT

A. *The Board's findings and conclusions.* The Board found that petitioner Union violated Section 8 (b) (2) and (1) (A) of the Act by entering into an illegal closed-shop agreement with the Dennehy Construction Co. (hereinafter referred to as the Company) thereby causing the Company discriminatorily to refuse employment to two prospective employees because they had not been cleared for the job by petitioner (R. 11–19, 24–27). The Board accordingly entered its order remedying these unfair labor practices (R. 26–27). Petitioner does not challenge the Board's substantive unfair labor practice findings and remedial order, but contends that the Board

erred in entertaining the unfair labor practice charges because they were not timely filed under Section 10 (b) of the Act.[1] The facts may be summarized as follows:

In June 1953, petitioner entered into an agreement with the Company under the terms of which only union members would be employed on the Company's construction project at Ardmore, Oklahoma by referral from petitioner (R. 12–13; 55, 58, 62–63, 39). On September 17, 1953, N. B. Black applied to Company Foreman Chapman for work for himself and his son as carpenters (R. 13; 34–35, 40). Chapman, who knew of Black's qualifications, told him that he needed and wanted both Black and his son but that they would first have to clear through petitioner (R. 13; 34, 35, 39, 40, 42). Chapman further stated that clearance might be "tough" because petitioner maintained a waiting list for referrals to the job (*ibid.*)

On September 25, the Blacks visited Estes, petitioner's business agent, and told him that they wanted work at the construction project where jobs were awaiting them (R. 14; 40–41, 52). Estes told the Blacks that there were about 30 employees ahead of them on petitioner's waiting list and that they would have to wait their turn (R. 14; 41, 52).

The Blacks then told Foreman Chapman of their conversation with Estes (R. 14; 41, 52). Chapman in turn took up the matter with the Superintendent

[1] Section 10 (b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

of the project who stated that the Company could, under the existing referral system, call for the men by name as "foremen" which would exempt the Blacks from the Union's rotation system (R. 14; 36, 41, 49, 50, 51, 58). The next day, Saturday, September 26, when Chapman requested Estes to send out the men as foremen, Estes agreed to do so (R. 14; 36–37, 42, 52–53, 56–57).

On Monday morning, September 28, 1953, the two Blacks went to the Local's office to get their referral slips (R. 14; 42–53). In the meantime, notwithstanding his agreement to refer the Blacks, Estes referred two other men to the job. Chapman, however, refused to hire them because he had not called for them (R. 15; 38, 57). When Estes learned of this, he decided to go out to the job site (R. 14; 57, 59, 52). The Blacks encountered him as he was leaving, and in response to their request for referrals, Estes told them that as soon as he could get to the job site there would be many more carpenters on the waiting list ahead of them, as he was going to shut down the job (R. 14; 42, 48, 53, 59). Upon arriving at the job site, Estes called the carpenters off the job. This was prompted primarily by the Company's failure to hire the two men whom he had sent out to the job instead of the Blacks (R. 14, 15; 37–38, 43, 57). The strike lasted two or three days (R. 15, 38).

The Blacks also went to the job site and told Chapman what had occurred. Chapman replied: "I'm sorry, but I have done all that I can do" (R. 15, 37-38).

Thereafter on March 25, 1954, the two Blacks filed the unfair labor practice charges herein, which were served upon petitioner the next day, March 26 (R. 11; 5, 6). On April 29, 1954, the Board's General Counsel issued his complaint, and in due course the matter was set down for a hearing before a trial examiner (R. 11; 6–8).

In its Decision and Order issued March 21, 1955, the Board concluded that petitioner, by entering into and maintaining a closed-shop agreement with the Company, and by causing the Company to refuse to hire two applicants pursuant to this agreement, violated Section 8 (b) (2) and (1) (A) of the Act (R. 24–27, 11–19). The Board rejected petitioner's contention that because the Company's initial refusal to hire the Blacks occurred on September 17, 1953, the charges filed more than six months thereafter were barred by the limitations provisions of Section 10 (b) of the Act. The Board stated (R. 24): "Without determining whether a discriminatory refusal to hire occurred on September 17, 1953, a date beyond the Section 10 (b) period, it is clear that the Blacks requested, and were refused, referral slips from Estes, the [petitioner's] Business Agent, on September 28, 1953, a date within the Section 10 (b) period."

B. *The decision of the court below.* The court below, one judge dissenting, enforced the Board's order in full, rejecting petitioner's contention that the unfair labor practices found were barred by Section 10 (b) of the Act (Pet. App. C, p. 21a–28a). The court below agreed with the decisions of other courts of appeals to the effect that "the continuous

enforcement of [an] illegal hiring agreement within six months prior to the filing of the complaint, constituted [an] unfair labor practice, and that such practice was therefore not barred" (Pet. App. C, pp. 24a–25a). The court below then stated (*ibid.*): "Here the closed shop agreement was entered into in June. And, while it may be said to have been discriminatorily enforced on September 17th when the Blacks first applied for a job and were told that they would have to clear through the Union, it was also enforced on the 28th when they were refused job clearance and the strike was called to enforce the illegal agreement. We therefore hold that the complaint is within the statutory period of limitations and the order of the Board will be enforced."

ARGUMENT

The ruling of the court below that the unfair labor practice charges filed in the instant case were not barred by Section 10 (b) of the Act, to the extent that they involved the application by petitioner and the Company of the illegal closed-shop agreement within six months immediately preceding the filing of the charges, accords with established principles and presents no question warranting review. In agreement with the court below, other courts of appeals have uniformly held "that the continuous enforcement of [such] agreement * * * within the six months period prior to the filing of the charge, was an unfair labor practice, and with respect to this continued and continuous enforcement of the illegal union shop agreement, the prosecution of the proceeding was not barred by limitations." *Katz* v. *National Labor Re-*

lations Board, 196 F. 2d 411, 415 (C. A. 9); *National Labor Relations Board* v. *United Hoisting Co.*, 198 F. 2d 465, 468–469 (C. A. 3), certiorari denied, 344 U. S. 914; *National Labor Relations Board* v. *F. H. McGraw & Co.*, 206 F. 2d 635 (C. A. 6); *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 721–722 (C. A. 2), affirmed, 347 U. S. 17.

Petitioner cannot escape liability for its action of September 28, 1953—a date within the six-month statutory period—when it discriminatorily caused the Company to refuse employment to the Blacks (*supra*, p. 4), merely because it had previously caused the Company to discriminate against them on September 17, 1953, more than six months prior to the filing of the charge. Each of these discriminatory acts constituted a new application of the illegal closed-shop agreement and, therefore, a new unfair labor practice subject to independent sanctions. See *National Labor Relations Board* v. *Textile Machine Works, Inc.*, 214 F. 2d 929, 932 (C. A. 3); *National Labor Relations Board* v. *White Construction and Engineering Co., Inc.*, 204 F. 2d 950, 952–953 (C. A. 5); *National Labor Relations Board* v. *Dallas General Drivers, etc.*, 228 F. 2d 702, 704 (C. A. 5); *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 791 (C. A. 7), certiorari denied, 340 U. S. 930; *National Labor Relations Board* v. *International Brotherhood of Teamsters, etc.*, 225 F. 2d 343, 346 (C. A. 8).

National Labor Relations Board v. *Pennwoven, Inc.*, 194 F. 2d 521 (C. A. 3) and *National Labor Relations Board* v. *Childs Co.*, 195 F. 2d 617 (C. A. 2), relied on by petitioner (Pet. 10–13), are, as the court below

pointed out (Pet. App. C., p. 24a), distinguishable. Neither of these cases dealt with the application of an illegal closed-shop contract. Nor did they involve, as here, separate and independent unlawful acts occurring specifically within the statutory period. In those cases, unlike this one, a showing that the respondent's conduct during the six-month period was unlawful could be predicated, in the courts' view, only upon an unfair labor practice which occurred prior to the six-month period; hence the courts concluded that the charge, filed more than six months after the "cause of action" arose, was untimely. See the *Textile Machine Workers* case, *supra,* 214 F. 2d at 932; the *United Hoisting* case, *supra,* 198 F. 2d at 468; the *Katz* case, *supra,* 196 F. 2d at 415, n. 5a; the *White Construction* case, *supra,* 204 F. 2d at 952, all of them distinguishing *Pennwoven.*

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

SAMUEL M. SINGER,
Attorney,
National Labor Relations Board.

AUGUST 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956